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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

(HONORABLE M. JAMES LORENZ)

11 UNITED STATES OF AMERICA,) Case No. 08CR0918-L
12 Plaintiff,) DATE: August 25, 2008
13 v.) TIME: 2:00 p.m.
14 FE S. GARRETT,) NOTICE OF MOTIONS AND MOTIONS:
15 Defendant.) (1) TO COMPEL DISCOVERY AND
16) PRESERVE EVIDENCE;
17) (2) TO SUPPRESS STATEMENTS;
18) (3) TO SUPPRESS EVIDENCE;
19) (4) DISMISS INDICTMENT DUE TO
20) MISINSTRUCTION OF GRAND
21) JURY;
22) (5) DISMISS INDICTMENT DUE TO
23) UNDUE DELAY IN FILING THE
24) CHARGES;
25) (6) DISMISS INDICTMENT DUE TO
) SELECTIVE PROSECUTION;
) (7) DISMISS THE INDICTMENT DUE
) TO THE GOVERNMENT
) MISLEADING THE GRAND JURY;
) (8) DISMISS THE INDICTMENT FOR
) PROSECUTORIAL MISCONDUCT;
) (9) TO ORDER THE GOVERNMENT
) TO DISCLOSE IDENTITY OF
) INFORMANT; AND
) (10) TO PRODUCE WITNESS AND
) EXHIBIT LISTS.

27 TO: KAREN P. HEWITT, UNITED STATES ATTORNEY; AND
CHRISTOPHER S. STRAUSS, ASSISTANT UNITED STATES ATTORNEY:

1 PLEASE TAKE NOTICE that on August 25, 2008 at 2:00 p.m., Fe S. Garrett, appearing pro
2 se, will ask this Court to enter an order granting the following motions.

3 **MOTIONS**

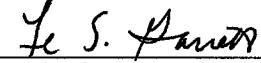
4 The defendant, Fe S. Garrett, pursuant to the United States Constitution, the Federal Rules
5 of Criminal Procedure, and all other applicable statutes, case law and local rules, hereby moves this
6 Court for an order to:

7 1) Compel discovery and preserve evidence;
8 2) To suppress statements;
9 3) To suppress evidence;
10 4) Dismiss indictment due to misinstruction of the grand jury;
11 5) Dismiss indictment due to undue delay in filing the charges;
12 6) Dismiss indictment due to selective prosecution;
13 7) Dismiss indictment due to the government misleading the grand jury;
14 8) Dismiss indictment for prosecutorial misconduct;
15 9) To order the government to disclose identity of informant; and
16 10) To produce exhibit and witness lists.

17 These motions are based upon the instant motions and notice of motions, the attached
18 statement of facts and memorandum of points and authorities, and all other materials that may come
19 to this Court's attention at the time of the hearing on these motions.

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28 Respectfully submitted,

DATED: August 11, 2008


FE S. GARRETT
Pro Se

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
(HONORABLE M. JAMES LORENZ)

11 UNITED STATES OF AMERICA,) Case No. 08CR0918-L
12 Plaintiff,)
13 v.) STATEMENT OF FACTS AND
14 FE S. GARRETT,) MEMORANDUM OF POINTS AND
15 Defendant.) AUTHORITIES IN SUPPORT OF
DEFENDANT'S MOTIONS

I.

STATEMENT OF FACTS¹

19 The defendant has been charged in a superceding indictment with aiding and assisting the
20 preparation of false tax returns in violation of 26 U.S.C. § 7206(2); filing false tax returns in
21 violation of 26 U.S.C. § 7206(1); and wilful failure to pay taxes in violation of 26 U.S.C. § 7203.
22 The charges span a period of several years, beginning in March 2002 and continuing to 2008. The
23 defendant was under investigation by the Criminal Investigation Division (“CID”) of the Internal
24 Revenue Service (“IRS”) for much of this period. An 25-count indictment was returned against the

¹ Unless otherwise stated, the “facts” referenced in these papers come from government-produced discovery that the defense continues to investigate. Ms. Garrett does not admit the accuracy of this information and reserves the right to challenge it at any time.

1 defendant on March 27, 2008. A 30-count superseding indictment was returned against the
 2 defendant on May 29, 2008. These motions follow.

3 **II.**

4 **MOTION TO COMPEL AND PRESERVE DISCOVERY**

5 The defendant requests the following discovery. This request is not limited to those items
 6 that the prosecutor knows of, but rather includes all discoverable materials that are in the custody,
 7 control, care or within the knowledge of any closely-related investigator, prosecutor, of, or other
 8 agency of the government. United States v. Santiago, 46 F.3d 885 (9th Cir. 1995).

9 The Due Process clause of the Fifth Amendment, Rule 16 of the Federal Rules of Criminal
 10 Procedure ("Rule 16"), as well as case law, impose a duty on the prosecution to disclose to the
 11 defense upon request any information favorable to the accused that is within the prosecutor's
 12 possession, either actual or constructive, and is material to the defendant's guilt or to sentencing.
 13 Brady v. Maryland, 373 US 83 (1963). This salutary principle imposes upon prosecutorial
 14 authorities a strict duty to disclose and identify all material evidence favorable to the defense whether
 15 or not it relates directly to the question of guilt and whether or not a request for a disclosure has been
 16 made. Giglio v. United States, 405 U.S. 150 (1972).

17 Specifically, Rule 16 requires the government to disclose, upon the defense's request, items
 18 "material to preparing the defense," as well as items the government "intends to use in its case-in-
 19 chief." Fed.R.Crim P. 16(a)(1)(E)(i)&(ii); see also United States v. Reeves, 892 F.2d 1223, 1226
 20 (5th Cir. 1990); United States v. Vue, 13 F.3d 1206, 1208 (8th Cir. 1994). This "rule is intended to
 21 prescribe the minimum amount of discovery to which the parties are entitled. It is not intended to
 22 limit the judge's discretion to order broader discovery in appropriate cases." Advisory Committee
 23 Note on 1974 Amendment to Rule 16 (emphasis added).

24 The prosecution's discovery obligation has been enunciated by the United States Supreme
 25 Court as:

26 The [government's] obligation is not to convict, but to see that, so far as
 27 possible, truth emerges. This is also the ultimate statement of its
 28 responsibility to provide a fair trial under the Due Process Clause of the
 Fourteenth Amendment. No respectable interest of the State is served by

1 its concealment of information which is material, generously conceived,
 2 to the case, including all possible defenses.

3 Giles v. Maryland, 386 US 66, 98 (1967).

4 The Due Process Clause of the Fifth Amendment requires the government to identify and
 5 disclose evidence that is material and “favorable to [the] accused.” Brady, 373 U.S. at 87; see
 6 also United States v. Bagley, 473 U.S. 667, 682 (1985). Evidence favorable to the accused includes
 7 not only evidence tending to exculpate them, but also any information that tends to impeach the
 8 government’s evidence or witnesses. See Giglio, 405 U.S. at 154; Bagley, 473 U.S. at 676.

9 The rule announced in Brady is premised on a defendant’s right to receive a fair trial, and
 10 therefore the government should be required to adopt a liberal approach to disclosure. Brady, 387
 11 U.S. at 87; see also Kyles v. Whitley, 514 U.S. 419, 439 (1995) (“[A] prosecutor anxious about
 12 tacking too close to the wind will disclose a favorable piece of evidence...This is as it should be.”);
 13 see also United States v. McVeigh, 954 F. Supp. 1441 (D. Colo. 1997) (Matsch, J.) (“Due Process
 14 require the government lawyers to resolve their doubts in favor of disclosure.”). Such an approach
 15 is necessary both to ensure “that justice shall be done,” and “to preserve the criminal trial, as distinct
 16 from the prosecutor’s private deliberation, as chosen forum for ascertaining the truth about criminal
 17 accusations.” Kyles, 514 U.S. at 439-40 (emphasis added).

18 Moreover, the prosecution has a duty to learn of and obtain all favorable evidence in the
 19 possession of others acting on their behalf, including the police. Kyles, 514 U.S. at 439; United
 20 States v. Wood, 57 F.3d 733, 737 (9th Cir. 1995) (prosecutor is charged with knowledge of material
 21 known to FDA). The test for materiality is whether the requested evidence might affect the outcome
 22 of the trial. United States v. Agurs, 427 US 97 (1976).

23 1. The Defendant’s Statements. The government must disclose to the defendant *all* copies
 24 of any written or recorded statements made by her; the substance of any statements made by the
 25 defendant that the government intends to offer in evidence at trial; any response by her to
 26 interrogation; the substance of any oral statements that the government intends to introduce at trial
 27 and any written summaries of her oral statements contained in the handwritten notes of the
 28 government agent; any response to any Miranda warnings that may have been given to her; and any
 other statements by her. Fed. R. Crim. P. 16(a)(1)(A) and (B). The Advisory Committee Notes and

1 the 1991 amendments to Rule 16 make clear that the government must reveal *all* of the defendant's
2 statements, whether oral or written, regardless of whether the government intends to make any use
3 of those statements.

4 2. Arrest Reports, Notes and Dispatch Tapes. The defendant also specifically requests
5 that all arrest reports, notes and dispatch or any other tapes that relate to the circumstances
6 surrounding her arrest or any questioning, if such reports have not already been produced *in their*
7 *entirety*, be turned over to her. This request includes, but is not limited to, any rough notes, records,
8 reports, transcripts or other documents in which statements of The defendant or any other
9 discoverable material is contained. This is all discoverable under Fed. R. Crim. P. 16(a)(1)(A) and
10 (B) and Brady v. Maryland, 373 U.S. 83 (1963). See also Loux v. United States, 389 F.2d 911 (9th
11 Cir. 1968). Arrest reports, investigator's notes, memos from arresting officers, dispatch tapes, sworn
12 statements, and prosecution reports pertaining to The defendant are available under Fed. R. Crim.
13 P. 16(a)(1)(A) and (B), Fed. R. Crim. P. 26.2 and 12(I). Preservation of rough notes is requested,
14 whether or not the government deems them discoverable.

15 3. Brady Material. The defendant requests all documents, statements, agents' reports, and
16 tangible evidence favorable to her on the issue of guilt and/or that affects the credibility of the
17 government's case. Impeachment and exculpatory evidence both fall within Brady's definition of
18 evidence favorable to the accused. United States v. Bagley, 473 U.S. 667 (1985); United States v.
19 Agurs, 427 U.S. 97 (1976).

20 4. Any Information That May Result in a Lower Sentence. As discussed above, any
21 information that may result in a more favorable sentence must also be disclosed pursuant to Brady,
22 373 U.S. 83. The government must disclose any cooperation or attempted cooperation by the
23 defendant, as well as any information that could affect any base offense level or specific offense
24 characteristic under Chapter Two of the United States Sentencing Commission Guidelines Manual
25 ("Guidelines"). Also included in this request is any information relevant to a Chapter Three
26 adjustment, a determination of the defendant's criminal history, or any other application of the
27 Guidelines.

28 5. The Defendant's Prior Record. Evidence of a prior record is available under

1 Fed. R. Crim. P. 16(a)(1)(D). The defendant specifically requests a complete copy of any criminal
2 record.

3 6. Any Proposed 404(b) Evidence. Evidence of prior similar acts is discoverable under
4 Fed. R. Crim. P. 16(a)(1)(D) and Fed. R. Evid. 404(b) and 609. In addition, under
5 Fed. R. Evid. 404(b), “upon request of the accused, the prosecution . . . shall provide reasonable
6 notice in advance of trial . . . of the general nature . . .” of any evidence the government proposes
7 to introduce under Fed. R. Evid. 404(b) at trial. Sufficient notice requires the government to
8 “articulate *precisely* the evidential hypothesis by which a fact of consequence may be inferred from
9 the other acts evidence.” United States v. Mehrmanesh, 689 F.2d 822, 830 (9th Cir. 1982) (emphasis
10 added; internal citations omitted); see also United States v. Brooke, 4 F.3d 1480, 1483
11 (9th Cir. 1993) (reaffirming Mehrmanesh and reversing convictions).

12 The defendant requests that such notice be given *four weeks before trial* to give the defense
13 time to adequately investigate and prepare for trial.

14 7. Evidence Seized. Evidence seized as a result of any search, either warrantless or with
15 a warrant, is discoverable under Fed. R. Crim. P. 16(a)(1)(E).

16 8. Request for Preservation of Evidence. The defense specifically requests that all
17 dispatch tapes or any other physical evidence that may be destroyed, lost, or otherwise put out of the
18 possession, custody, or care of the government and that relate to the arrest or the events leading to
19 the arrest in this case be preserved. This request includes, but is not limited to **the defendant’s**
20 **personal effects and any evidence seized from the defendant or any third party.** This request
21 also includes any material or percipient witnesses who might be deported or otherwise likely to
22 become unavailable.

23 It is requested that the prosecutor be ordered to *question* all the agencies and individuals
24 involved in the prosecution and investigation of this case to determine if such evidence exists, and
25 if it does exist, to inform those parties to preserve any such evidence.

26 9. Henthorn Material. The defendant requests that the Assistant United States Attorney
27 (“AUSA”) assigned to this case oversee (not personally conduct) a review of all personnel files of
28 each agent involved in the present case for impeachment material. See Kyles v. Whitley, 514 U.S.

1 437, 438 (1995) (holding that "the individual prosecutor has a duty to learn of any favorable
 2 evidence known to the others acting on the government's behalf in the case, including the police");
 3 United States v. Henthorn, 931 F.2d 29 (9th Cir. 1991). This request includes, but is not limited to,
 4 any complaints filed (by a member of the public, by another agent, or any other person) against the
 5 agent, whether or not the investigating authority has taken any action, as well as any matter for which
 6 a disciplinary review was undertaken, whether or not any disciplinary action was ultimately
 7 recommended. The defendant further requests production of any such information at least *one week*
 8 prior to the motion hearing and two weeks prior to trial. If the prosecutor is uncertain whether
 9 certain information should be disclosed pursuant to this request, this information should be produced
 10 to the Court in advance of the motion hearing and the trial for an *in camera* inspection.

11 10. Tangible Objects. The defendant requests the opportunity to inspect, copy, and test,
 12 as necessary, all other documents and tangible objects, including photographs, books, papers,
 13 documents, alleged narcotics, fingerprint analyses, vehicles, or copies of portions thereof, that are
 14 material to the defense or intended for use in the government's case-in-chief or were obtained from
 15 or belong to The defendant. Fed. R. Crim. P. 16(a)(1)(E).

16 This is not a five-witness border bust case, nor is it even a reasonably common document
 17 intensive white collar prosecution. This is a case involving hundreds of thousands of documents;
 18 evidence from an undercover operations; and evidence from an executed search warrant. Simply
 19 providing the defense with a large volume of discovery and inviting them to find the exculpatory
 20 "needle in the haystack" is inconsistent with the fundamental constitutional protections afforded by
 21 *Brady*. The government's duty to comply with Rule 16 and *Brady* is not fulfilled, in cases such as
 22 this, where the prosecution buries the defendants with discovery.

23 The production of hundreds of thousands of pages of discovery neither satisfies Rule 16 nor
 24 *Brady*. Rule 16 "requires more than a perfunctory invitation to look at the contents of a file." United
 25 States v. Pascual, 606 F.2d 561, 565 (5th Cir. 1979). This is true even in cases involving tens of
 26 thousands of pages of documents, let alone hundreds of thousands, as is the case here. See United
 27 States v. Turkish, 458 F. Supp. 874, 882 (S.D.N.Y. 1978) (Rule 16 not satisfied by "burying the
 28 defendant in [approximately 25,000 pages] of paper"); United States v. Poindexter, 727 F. Supp.

1 1470, 1484 (D.D.C. 1989) ("[B]road brush approach" to discovery – wherein the government
 2 identified "several thousand pages, any of which it 'may' rely on at trial" – did not satisfy Rule 16).

3 Moreover, the government has an "independent duty to identify and disclose Brady material."
 4 Lockhart v. McCotter, 782 F.2d 1275, 1282 (5th Cir. 1986). Granting the accused access to
 5 hundreds of thousands of pages of paper and electronic data and inviting them to find the exculpatory
 6 "needle in the haystack" is inconsistent with fundamental constitutional protections afforded by
 7 Brady. See United States v. Hsia, 24 F. Supp. 2d 14, 29-30 (D.D.C. 1998). As the Hsia Court
 8 explained:

9 The government cannot meet its Brady obligations by providing Ms.
 10 Hsia with access to 600,000 documents and then claiming that she
 11 should have been able to find the exculpatory information in the
 12 haystack. To the extent that the government knows of any documents or
 13 statements that constitute Brady material, it must identify that material
 14 to Ms. Hsia.

15 Id.

16 Numerous courts are in agreement that merely dumping a large amount of discovery or
 17 sending defendants on a fishing expedition for exculpatory materials is far from enough to satisfy
 18 Brady. "[T]he prosecutorial duty to produce exculpatory evidence imposed by Brady may not be
 19 discharged by 'dumping' (even in good faith) a voluminous mass of files, tapes, and documentary
 20 evidence." Emmett v. Ricketss, 397 F. Supp. 1025, 1043 (N.D. Ga. 1975); see also United States v.
 21 Bortnovsky, 820 F.2d 572, 574-575 (2nd Cir. 1987) (holding that "[t]he Government did not fulfill
 22 its obligation merely by providing mountains of documents to defense counsel who were left
 23 unguided as to which documents would be proven falsified or which of some fifteen burglaries
 24 would be demonstrated to be staged.") In short, the production of hundreds of thousands of pages
 25 of discovery does not constitute compliance with Rule 16 or Brady.

26 11. Expert Witnesses. The defendant requests the name, qualifications, and a written
 27 summary of the testimony of any person that the government intends to call as an expert witness
 28 during its case in chief. Fed. R. Crim. P. 16(a)(1)(G). This summary should include a description
 29 of the witness' opinion(s), as well as the bases and the reasons for the opinion(s). See United States
 30 v. W.R. Grace, new cite, *9 (9th Cir., July 12, 2007); United States v. Duvall, 272 F.3d 825 (7th Cir.
 31 2001) (finding that government's written expert notice did not adequately summarize or describe
 32 police detective's testimony in drug prosecution where notice provided only a list of the general

1 subject matters to be covered and failed to identify what opinion the expert would offer on those
 2 subjects). This request includes, but is not limited to, disclosure of the qualifications of any
 3 government witness who will testify that he understands and/or speaks Spanish or any other foreign
 4 language that may have been used during the course of an interview with the defendant or any other
 5 witness.

6 The defendant requests the notice of expert testimony be provided at a minimum of *three*
 7 *weeks prior to trial* so that the defense can properly prepare to address and respond to this testimony,
 8 including obtaining its own expert and/or investigating the opinions, credentials of the government's
 9 expert and obtain a hearing in advance of trial to determine the admissibility of qualifications of any
 10 expert. See Kumho v. Carmichael Tire Co., 526 U.S. 137, 119 S. Ct. 1167, 1176 (1999) (trial judge
 11 is "gatekeeper" and must determine, reliability and relevancy of expert testimony and such
 12 determinations may require "special briefing or other proceedings").

13 12. Impeachment evidence. The defendant requests any evidence that any prospective
 14 government witness has engaged in any criminal act whether or not resulting in a conviction and
 15 whether any witness has made a statement favorable to The defendant. See Fed. R. Evid. 608, 609
 16 and 613. Such evidence is discoverable under Brady, 373 U.S. 83. See United States v. Strifler,
 17 851 F.2d 1197 (9th Cir. 1988) (witness' prior record); Thomas v. United States, 343 F.2d 49
 18 (9th Cir. 1965) (evidence that detracts from a witness' credibility).

19 13. Evidence of Criminal Investigation of Any Government Witness. The defendant
 20 requests any evidence that any prospective witness is under investigation by federal, state or local
 21 authorities for any criminal conduct. United States v. Chitty, 760 F.2d 425 (2d Cir. 1985).

22 14. Evidence of Bias or Motive to Lie. The defendant requests any evidence that any
 23 prospective government witness is biased or prejudiced against her, or has a motive to falsify or
 24 distort his or her testimony. Pennsylvania v. Ritchie, 480 U.S. 39 (1987); Strifler, 851 F.2d 1197.

25 15. Evidence Affecting Perception, Recollection, Ability to Communicate, or Veracity.
 26 The defendant requests any evidence, including any medical or psychiatric report or evaluation,
 27 tending to show that any prospective witness's ability to perceive, remember, communicate, or tell
 28

1 the truth is impaired; and any evidence that a witness has ever used narcotics or other controlled substance,
2 or has ever been an alcoholic. Strifler, 851 F.2d 1197; Chavis v. North Carolina, 637 F.2d 213, 224
3 (4th Cir. 1980).

4 16. Witness Addresses. The defendant requests the name and last known address of each
5 prospective government witness. See United States v. Napue, 834 F.2d 1311 (7th Cir. 1987);
6 United States v. Tucker, 716 F.2d 576 (9th Cir. 1983) (failure to interview government witnesses
7 by counsel is ineffective); United States v. Cook, 608 F.2d 1175, 1181 (9th Cir. 1979) (defense has
8 equal right to talk to witnesses). The defendant also requests the name and last known address of
9 every witness to the crime or crimes charged (or any of the overt acts committed in furtherance
10 thereof) who will *not* be called as a government witness. United States v. Cadet, 727 F.2d 1453
11 (9th Cir. 1984).

12 17. Name of Witnesses Favorable to the Defendant. The defendant requests the name of
13 any witness who made any arguably favorable statement concerning her or who could not identify
14 him or who was unsure of his identity or participation in the crime charged. Jackson v. Wainwright,
15 390 F.2d 288 (5th Cir. 1968); Chavis, 637 F.2d at 223; Jones v. Jago, 575 F.2d 1164, 1168
16 (6th Cir. 1978); Hudson v. Blackburn, 601 F.2d 785 (5th Cir. 1979), cert. denied, 444 U.S. 1086
17 (1980).

18 18. Statements Relevant to the Defense. The defendant requests disclosure of any
19 statement that may be “relevant to any possible defense or contention” that he might assert. United
20 States v. Bailleaux, 685 F.2d 1105 (9th Cir. 1982). This includes grand jury transcripts that are
21 relevant to the defense motion to dismiss the indictment.

22 19. Jencks Act Material. The defendant requests production in advance of the motion
23 hearing or trial of all material, including dispatch tapes, that the government must produce pursuant
24 to the Jencks Act, 18 U.S.C. § 3500 and Fed. R. Crim. P. 26.2. A verbal acknowledgment that
25 “rough” notes constitute an accurate account of the witness’ interview is sufficient for the report or
26 notes to qualify as a statement under section 3500(e)(1). Campbell v. United States, 373 U.S. 487,
27 490-92 (1963); see also United States v. Boshell, 952 F.2d 1101 (9th Cir. 1991) (holding that
28 interview notes constitutes Jencks material when an agent reviews notes with the subject of the

1 interview); see also United States v. Riley, 189 F.3d 802, 806-808 (9th Cir. 1999). Advance
2 production will avoid the possibility of delay of the motion hearing or trial to allow The defendant
3 to investigate the Jencks material. The defendant requests pre-trial disclosure of such statements to
4 avoid unnecessary recesses and delays and to allow defense counsel to prepare for, and use properly
5 any Jencks statements during cross-examination.

6 20. Giglio Information. Pursuant to Giglio v. United States, 405 U.S. 150 (1972), The
7 defendant requests all statements and/or promises, expressed or implied, made to any government
8 witnesses, in exchange for their testimony in this case, and all other information that could arguably
9 be used for the impeachment of any government witnesses.

10 21. Agreements Between the Government and Witnesses. The defendant requests
11 discovery regarding any express or implicit promise, understanding, offer of immunity, of past,
12 present, or future compensation, or any other kind of agreement or understanding, including any
13 implicit understanding relating to criminal or civil income tax, forfeiture or fine liability, between
14 any prospective government witness and the government (federal, state and/or local). This request
15 also includes any discussion with a potential witness about or advice concerning any immigration
16 benefits, any contemplated prosecution, or any possible plea bargain, even if no bargain was made
17 or the advice not followed.

18 22. Informants and Cooperating Witnesses. The defendant requests disclosure of the
19 names and addresses of all informants or cooperating witnesses used or to be used in this case, and
20 in particular, disclosure of any informant who was a percipient witness in this case or otherwise
21 participated in the crime charged against the defendant. The government must disclose the
22 informant's identity and location, as well as disclose the existence of any other percipient witness
23 unknown or unknowable to the defense. Roviaro v. United States, 353 U.S. 52, 61-62 (1957). The
24 government must disclose any information derived from informants that exculpates or tends to
25 exculpate the defendant.

26 23. Bias by Informants or Cooperating Witnesses. The defendant requests disclosure of
27 any information indicating bias on the part of any informant or cooperating witness. Giglio, 405
28 U.S. 24. Such information would include what, if any, inducements, favors, payments or threats

1 were made to the witness to secure cooperation with the authorities.

2 24. Personnel Records of Government Officers Involved in the Arrest. The defendant
3 requests all citizen complaints and other related internal affairs documents involving any of the
4 immigration officers or other law enforcement officers who were involved in the investigation, arrest
5 and interrogation of the defendant. See Pitchess v. Superior Court, 11 Cal. 3d 531, 539 (1974).
6 Because of the sensitive nature of these documents, defense counsel will be unable to procure them
7 from any other source.

8 25. Training of Relevant Law Enforcement Officers. The defendant requests copies of all
9 written videotaped or otherwise recorded policies or training instructions or manuals issued by all
10 law enforcement agencies involved in the case (United States Customs Service, Border Patrol, INS,
11 Department of Homeland Security, etc.) to their employees regarding: (a) the handling of vehicles
12 suspected to be transporting contraband across the port of entry; (b) the referral to secondary
13 inspection of persons within those vehicles; (c) the detention of individuals within those vehicles;
14 (d) the search of those vehicles and the occupants of those vehicles, including the proper means of
15 obtaining consent to search and what constitutes consent to search; (e) the informing of suspects of
16 their Constitutional rights; (f) the questioning of suspects and witnesses. The defendant also requests
17 all written or otherwise attainable information regarding the training of Customs agents at ports of
18 entry in California to detect or discover contraband in vehicles entering the United States, including
19 any training offered to Border Patrol, INS, or officers of Homeland Security Department, by the DEA
20 or other law enforcement agencies or individuals.

21 26. Performance Goals and Policy Awards. The defendant requests disclosure of
22 information regarding standards used for measuring, compensating or reprimanding the conduct of
23 all law enforcement officers involved in the case (Customs, Border Patrol, INS, etc.) to the extent
24 such information relates to the detection of contraband. This request specifically includes
25 information concerning performance goals, policy awards, and the standards used by Customs for
26 commending, demoting, or promoting agents for their performance at the port of entry and their
27 success or failure to detect illegal narcotics in general.

28 ///

1 27. Reports of Scientific Tests or Examinations. Pursuant to Fed. R. Crim. P. 16(a)(1)(F),
2 The defendant requests disclosure and the opportunity to inspect, copy, and photograph the results
3 and reports of all tests, examinations, and experiments conducted upon the evidence in this case,
4 including, but not limited to, any fingerprint testing done upon any evidence seized in this case, that
5 is within the possession, custody, or control of the government, the existence of which is known, or
6 by the exercise of due diligence may become known, to the attorney for the government, and that are
7 material to the preparation of the defense or are intended for use by the government as evidence in
8 chief at the trial.

9 28. Brady Information. The defendant requests all documents, statements, agents' reports,
10 and tangible evidence favorable to the defendant on the issue of guilt and/or which affects the
11 credibility of the government's case. Under Brady v. Maryland, 373 U.S. 83 (1963), impeachment
12 as well as exculpatory evidence falls within the definition of evidence favorable to the accused.
13 United States v. Bagley, 473 U.S. 667 (1985); United States v. Agurs, 427 U.S. 97 (1976).

14 29. Any Proposed 404(b) Evidence. The government must produce evidence of prior
15 similar acts under Fed. R. Crim. P. 16(a)(1) and Fed. R. Evid. 404(b) and any prior convictions
16 which would be used to impeach as noted in Fed. R. Crim. P. 609. In addition, under
17 Fed. R. Evid. 404(b), "upon request of the accused, the prosecution . . . shall provide reasonable
18 notice in advance of trial . . . of the general nature" of any evidence the government proposes to
19 introduce under Fed. R. Evid. 404(b) at trial. The defendant requests notice two weeks before trial
20 to give the defense time to investigate and prepare for trial.

21 30. Specific Requests. The defendant specifically requests the opportunity to view the "A-
22 File" of the material witness in this case. She also specifically requests all reports and
23 documentation relating to prior apprehensions of the material witness.

24 31. Residual Request. The defendant intends by this discovery motion to invoke her rights
25 to discovery to the fullest extent possible under the Federal Rules of Criminal Procedure and the
26 Constitution and laws of the United States.

27 ///

28 ///

III.

MOTION TO SUPPRESS STATEMENTS

At this time, the defendant is unaware of any statements that the government may seek to introduce at trial. If the government intends to introduce any of the defendant's purported statements, she moves to suppress them. Prior to introducing such statements at trial, the government must demonstrate compliance with Miranda and that any such statements were voluntary.

A. The Government Must Demonstrate Compliance with Miranda.

9 In order for any statements made by Ms. Garrett to be admissible against her, the government
10 must demonstrate that they were obtained in compliance with Miranda v. Arizona, 384 U.S. 436
11 (1966). Specifically, the government must establish that the defendant waived her rights and that
12 any waiver of her Miranda rights was voluntary, knowing, and intelligent. See Schneckloth v.
13 Bustamonte, 412 U.S. 218 (1973). When an interrogation continues without the presence of an
14 attorney, and a statement results, the government has a heavy burden to demonstrate that the
15 defendant has intelligently and voluntarily waived his privilege against self-incrimination. Miranda,
16 384 U.S. at 475. The court must indulge every reasonable presumption against waiver of
17 fundamental constitutional rights, so the burden on the government is great. United States v. Heldt,
18 745 F. 2d 1275, 1277 (9th Cir. 1984).

In determining whether a waiver is voluntary, knowing, and intelligent, the court looks to the totality of the circumstances surrounding the case. Edwards v. Arizona, 451 U.S. 477 (1981); United States v. Garibay, 143 F.3d 534 (9th Cir. 1998). The Ninth Circuit has held that determination of the validity of a Miranda waiver requires a two prong analysis: the waiver must be both (1) voluntary and (2) knowing and intelligent. Derrick v. Peterson, 924 F. 2d 813 (9th Cir. 1990). The second prong requires an inquiry into whether “the waiver [was] made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it.” Id. at 820-821 (quoting Colorado v. Spring, 479 U.S. 564, 573 (1987)). Not only must the waiver be uncoerced, then, it must also involve a “requisite level of comprehension” before a court may conclude that Miranda rights have been legitimately waived. Id. (quoting Colorado v. Spring, 479

1 U.S. at 573). Unless and until Miranda warnings and a knowing and intelligent waiver are
 2 demonstrated by the prosecution, no evidence obtained as a result of the interrogation can be used
 3 against the defendant. Miranda, 384 U.S. at 479. The government in this case must prove that the
 4 defendant waived her rights intelligently and voluntarily. The defendant disputes any allegation that
 5 any waiver was knowing, intelligent, and voluntarily.

6 **B. The Defendant's Statements Must Be Voluntary.**

7 Even if this Court determines that Ms. Garrett validly waived her Miranda rights, it must still
 8 make a determination that any statements are voluntary. Under 18 U.S.C. § 3501(a), this Court is
 9 required to determine, whether any statements made by Ms. Garrett are voluntary. In addition,
 10 section 3501(b) requires this Court to consider various enumerated factors, including whether Ms.
 11 Garrett understood the nature of the charges against her and whether she understood her rights.
 12 Without such evidence, this Court cannot adequately consider these statutorily mandated factors.

13 Moreover, section 3501(a) requires this Court to make a factual determination. Where a
 14 factual determination is required, Fed. R. Crim. P. 12 obligates courts to make factual findings. See
 15 United States v. Prieto-Villa, 910 F.2d 601, 606-10 (9th Cir. 1990). Because "suppression hearings
 16 are often as important as the trial itself," id. at 610 (quoting Waller v. Georgia, 467 U.S. 39, 46
 17 (1984)), these findings should be supported by evidence, not merely an unsubstantiated recitation
 18 of purported evidence in a prosecutor's responsive pleading. Therefore, prior to admitting any
 19 alleged statements from Ms. Garrett, a hearing must be held to determine whether the statements
 20 were voluntary.

21 **IV.**

22 **SUPPRESS ALL EVIDENCE SEIZED IN VIOLATION OF THE FOURTH**
 23 **AMENDMENT**

24 The Fourth Amendment prohibits "unreasonable" searches and seizures. U.S. CONST.
 25 Amend. IV; Terry v. Ohio, 392 U.S. 1, 20-21 (1968). The test of whether a seizure is reasonable
 26 entails a balancing of the governmental interest that justifies the intrusion against the individual's
 27 privacy expectations and interests. See Ferguson v. City of Charleston, 532 U.S. 67, 84 n.21 (2001);
 28 see also Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 448-49 (1990). In this case, the
 government must prove the seizure of any evidence did not implicate the defendant's Fourth

1 Amendment rights. The defendant specifically challenges the validity of the search warrant affidavit
 2 prepared by Special Agent Len Bradley, the search warrant itself, and the subsequent execution of
 3 the search warrant at her home and place of business. The defendant further moves to suppress all
 4 outdated evidence – documentary and otherwise – because it is obsolete, confusing, and wastes time.

5 **V.**

6 **THE INDICTMENT SHOULD BE DISMISSED BECAUSE JUDGE BURNS'S**
 7 **INSTRUCTIONS AS A WHOLE PROVIDED TO THE JANUARY 2007 GRAND JURY**
 8 **RUN AFOUL OF BOTH NAVARRO-VARGAS AND WILLIAMS AND VIOLATE THE**
FIFTH AMENDMENT BY DEPRIVING THE DEFENDANT OF THE TRADITIONAL
FUNCTIONING OF THE GRAND JURY

9 **A. Introduction.**

10 The indictment in the instant case was returned by the January 2007 grand jury. That grand
 11 jury was instructed by the Honorable Larry A. Burns, United States District Court Judge on January
 12 11, 2007. See Reporter's Partial Transcript of the Proceedings, dated January 11, 2007, a copy of
 13 which is attached hereto as Exhibit A. Judge Burns's instructions to the impaneled grand jury deviate
 14 from the instructions at issue in the major Ninth Circuit cases challenging a form grand jury
 15 instruction previously given in this district in several ways.² These instructions compounded Judge
 16 Burns's erroneous instructions and comments to prospective grand jurors during voir dire of the
 17 grand jury panel, which immediately preceded the instructions at Ex. A. See Reporter's Transcript
 18 of Proceedings, dated January 11, 2007, a copy of which is attached hereto as Exhibit B.

19 **1. Judge Burns Instructed Grand Jurors That Their Singular Duty Is**
to Determine Whether or Not Probable Cause Exists and That They
Have No Right to Decline to Indict When the Probable Cause
Standard Is Satisfied.

22 After repeatedly emphasizing to the grand jurors that probable cause determination was their
 23 sole responsibility, see Ex. A at 3, 3-4, 5,³ Judge Burns instructed the grand jurors that they were

26 ² See, e.g., United States v. Cortez-Rivera, 454 F.3d 1038 (9th Cir. 2006); United States v.
 27 Navarro-Vargas, 408 F.3d 1184 (9th Cir.) (en banc), cert. denied, 126 S. Ct. 736 (2005) (Navarro-
Vargas II); United States v. Navarro-Vargas, 367 F.3d 896 (9th Cir. 2004) (Navarro-Vargas I); United
 28 States v. Marcucci, 299 F.3d 1156 (9th Cir. 2002) (per curiam).

³ See also id. at 20 ("You're all about probable cause.").

1 forbidden "from judg[ing] the wisdom of the criminal laws enacted by Congress; that is, whether or
 2 not there should be a federal law or should not be a federal law designating certain activity [as]
 3 criminal is not up to you." See id. at 8. The instructions go beyond that, however, and tell the grand
 4 jurors that, should "you disagree with that judgment made by Congress, then your option is not to
 5 say 'well, I'm going to vote against indicting even though I think that the evidence is sufficient' or
 6 'I'm going to vote in favor of even though the evidence may be insufficient.'" See id. at 8-9. Thus,
 7 the instruction flatly bars the grand jury from declining to indict because the grand jurors disagree
 8 with a proposed prosecution.

9 Immediately before limiting the grand jurors' powers in the way just described, Judge Burns
 10 referred to an instance in the grand juror selection process in which he excused three potential jurors.
 11 See id. at 8.

12 I've gone over this with a couple of people. You understood from the questions and
 13 answers that a couple of people were excused, I think three in this case, because they
 could not adhere to the principle that I'm about to tell you.

14 Id. That "principle" was Judge Burns's discussion of the grand jurors' inability to give effect to their
 15 disagreement with Congress. See id. at 8-9. Thus, Judge Burns not only instructed the grand jurors
 16 on his view of their discretion; he enforced that view on pain of being excused from service as a
 17 grand juror.

18 Examination of the recently disclosed voir dire transcript, which contains additional
 19 instructions and commentary in the form of the give and take between Judge Burns and various
 20 prospective grand jurors, reveals how Judge Burns's emphasis of the singular duty is to determine
 21 whether or not probable cause exists and his statement that grand jurors they cannot judge the
 22 wisdom of the criminal laws enacted by Congress merely compounded an erroneous series of
 23 instructions already given to the grand jury venire. In one of his earliest substantive remarks, Judge
 24 Burns makes clear that the grand jury's sole function is probable cause determination.

25 [T]he grand jury is determining really two factors: "do we have a reasonable belief
 26 that a crime was committed? And second, do we have a reasonable belief that the
 person that they propose that we indict committed the crime?"

27 If the answer is "yes" to both of those, then the case should move forward. If the
 28 answer to either of the questions is "no," then the grand jury should not hesitate and
 not indict.

1 See Ex. B at 8. In this passage, Judge Burns twice uses the term "should" in a context makes clear
 2 that the term is employed to convey instruction: "should" cannot reasonably be read to mean optional
 3 when it addresses the obligation not to indict when the grand jury has no "reasonable belief that a
 4 crime was committed" or if it has no "reasonable belief that the person that they propose that we
 5 indict committed the crime."

6 Equally revealing are Judge Burns's interactions with two potential grand jurors who
 7 indicated that, in some unknown set of circumstances, they might decline to indict even where there
 8 was probable cause. Because of the redactions of the grand jurors' names, Mr. Santana will refer to
 9 them by occupation. One is a retired clinical social worker (hereinafter CSW), and the other is a real
 10 estate agent (hereinafter REA). The CSW indicated a view that no drugs should be considered
 11 illegal and that some drug prosecutions were not an effective use of resources. See id. at 16. The
 12 CSW was also troubled by certain unspecified immigration cases. See id.

13 Judge Burns made no effort to determine what sorts of drug and immigration cases troubled
 14 the CSW. He never inquired as to whether the CSW was at all troubled by the sorts of cases actually
 15 filed in this district, such as drug smuggling cases and cases involving reentry after deportation and
 16 alien smuggling. Rather, he provided instructions suggesting that, in any event, any scruples CSW
 17 may have possessed were simply not capable of expression in the context of grand jury service.

18 Now, the question is can you fairly evaluate [drug cases and immigration cases]?
 19 Just as the defendant is ultimately entitled to a fair trial and the person that's accused
 20 is entitled to a fair appraisal of the evidence of the case that's in front of you, so, too,
 21 is the United States entitled to a fair judgment. If there's probable cause, then the
 22 case should go forward. *I wouldn't want you to say, "well, yeah, there's probable*
 cause, but I still don't like what our government is doing. I disagree with these laws,
 so I'm not going to vote for it to go forward." If that is your frame of mind, the
 probably you shouldn't serve. Only you can tell me that.

23 See id. at 16-17 (emphasis added). Thus, without any sort of context whatsoever, Judge Burns let
 24 the grand juror know that he would not want him or her to decline to indict in an individual case
 25 where the grand juror "[didn't] like what our government is doing," see id. at 17, but in which there
 26 was probable cause. See Id. Such a case "should go forward." See id. Given that blanket
 27 proscription on grand juror discretion, made manifest by Judge Burns's use of the pronoun "I", the
 28 CSW indicated that it "would be difficult to support a charge even if [the CSW] thought the evidence

1 warranted it." See id. Again, Judge Burns's question provided no context; he inquired regarding "a
 2 case," a term presumably just as applicable to possession of a small amount of medical marijuana
 3 as kilogram quantities of methamphetamine for distribution. Any grand juror listening to this
 4 exchange could only conclude that there was *no* case in which Judge Burns would permit them to
 5 vote "no bill" in the face of a showing probable cause.

6 Just in case there may have been a grand juror that did not understand his or her inability to
 7 exercise anything like prosecutorial discretion, Judge Burns drove the point home in his exchange
 8 with REA. REA first advised Judge Burns of a concern regarding the "disparity between state and
 9 federal law" regarding "medical marijuana." See id. at 24. Judge Burns first sought to address
 10 REA's concerns about medical marijuana by stating that grand jurors, like trial jurors, are simply
 11 forbidden from taking penalty considerations into account.

12 Well, those things -- the consequences of your determination shouldn't concern you
 13 in the sense that penalties or punishment, things like that -- we tell trial jurors, of
 14 course, that they cannot consider the punishment or the consequence that Congress
 has set for these things. We'd ask you to also abide by that. We want you to make
 a business-like decision of whether there was a probable cause. . . .

15 Id. at 24-25. Having stated that REA was to "abide" by the instruction given to trial jurors, Judge
 16 Burns went on to suggest that REA recuse him or herself from medical marijuana cases. See id. at
 17 25.

18 In response to further questioning, REA disclosed REA's belief "that drugs should be legal."
 19 See id. That disclosure prompted Judge Burns to begin a discussion that ultimately led to an
 20 instruction that a grand juror is obligated to vote to indict if there is probable cause.

21 I can tell you sometimes I don't agree with some of the legal decisions that are
 22 indicated that I have to make. But my alternative is to vote for someone different,
 vote for someone that supports the policies I support and get the law changed. It's not
 23 for me to say, "well, I don't like it. So I'm not going to follow it here."

24 You'd have a similar obligation as a grand juror even though you might have to grit
 your teeth on some cases. Philosophically, if you were a member of congress, you'd
 25 vote against, for example, criminalizing marijuana. I don't know if that's it, but you'd
 vote against criminalizing some drugs.

26 That's not what your prerogative is here. You're prerogative instead is to act like a
 27 judge and say, "all right. This is what I've to deal with objectively. Does it seem to
 me that a crime was committed? Yes. Does it seem to me that this person's
 28 involved? It does." *And then your obligation, if you find those to be true, would be
 to vote in favor of the case going forward.*

1 Id. at 26-27 (emphasis added). Thus, the grand juror's duty is to conduct a simple two part test,
 2 which, if both questions are answered in the affirmative, lead to an "obligation" to indict.

3 Having set forth the duty to indict, and being advised that REA was "uncomfortable" with
 4 that paradigm, Judge Burns then set about to ensure that there was no chance of a deviation from the
 5 obligation to indict in every case in which there was probable cause.

6 The Court: Do you think you'd be inclined to let people go in drug cases even though
 7 you were convinced there was probable cause they committed a drug offense?
 REA: It would depend on the case.

8 The Court: Is there a chance that you would do that?

REA: Yes.

The Court: I appreciate your answers. I'll excuse you at this time.

9
 10 Id. at 27. Two aspects of this exchange are crucial. First, REA plainly does not intend to act solely
 11 on his political belief in decriminalization -- whether he or she would indict "depend[s] on the case,"
 12 see id., as it should. Because REA's vote "depend[s] on the case," see id., it is necessarily true that
 13 REA would vote to indict in some (perhaps many or even nearly all) cases in which there was
 14 probable cause. Again, Judge Burns made no effort to explore REA's views; he did not ascertain
 15 what sorts of cases would prompt REA to hesitate. The message is clear: it does not matter what
 16 type of case might prompt REA's reluctance to indict because, once the two part test is satisfied, the
 17 "obligation" is "to vote in favor of the case going forward."⁴ See id. at 27. That is why even the
 18 "chance," see id., that a grand juror might not vote to indict was too great a risk to run.

19
 20 **2. The Instructions Posit a Non-Existent Prosecutorial Duty to Offer
 21 Evidentiary Evidence.**

22 In addition to his instructions on the authority to choose not to indict, Judge Burns also
 23 assured the grand jurors that prosecutors would present to them evidence that tended to undercut
 24

25
 26 ⁴ This point is underscored by Judge Burns's explanation to the Grand Jury that a magistrate
 27 judge will have determined the existence of probable cause "in most circumstances" before it has
 28 been presented with any evidence. See Ex. A at 6. This instruction created an imprimatur of finding
 probable cause in each case because had a magistrate judge not so found, the case likely would not
 have been presented to the Grand Jury for indictment at all. The Grand Jury was informed that it
 merely was redundant to the magistrate court "in most circumstances." See id. This instruction
 made the grand jury more inclined to indict irrespective of the evidence presented.

1 probable cause. See Ex. A at 20.⁵

2 Now, again, this emphasizes the difference between the function of the grand jury
 3 and the trial jury. You're all about probable cause. If you think that there's evidence
 4 out there that might cause you to say "well, I don't think probable cause exists," then
 5 it's incumbent upon you to hear that evidence as well. As I told you, in most
 6 instances, *the U.S. Attorneys are duty-bound to present evidence that cuts against*
 7 *what they may be asking you to do if they're aware of that evidence.*

8 Id. (emphasis added).

9 The antecedent to this instruction is also found in the voir dire. After advising the grand
 10 jurors that "the presentation of evidence to the grand jury is necessarily one-sided," see Ex. B at 14,
 11 Judge Burns gratuitously added that "[his] experience is that the prosecutors don't play hide-the-ball.
 12 If there's something adverse or that cuts against the charge, you'll be informed of that. They have
 13 a duty to do that." See id. Thus, Judge Burns unequivocally advised the grand jurors that the
 14 government would present any evidence that was "adverse" or "that cuts against the charge." See

15 ⁵ These instructions were provided in the midst of several comments that praised the United
 16 States attorney's office and prosecutors in general. Judge Burns advised the grand jurors that they
 17 "can expect that the U.S. Attorneys that will appear in front of [them] will be candid, they'll be
 18 honest, and . . . they'll act in good faith in all matters presented to you." See Ex. A at 27. The
 19 instructions delivered during voir dire go even further. In addressing a prospective grand juror who
 20 revealed "a strong bias for the U.S. Attorney, whatever cases they might bring," see Ex. B at 38,
 21 Judge Burns affirmatively endorsed the prospective juror's view of the U.S. Attorney's office, even
 22 while purporting to discourage it: "frankly, I agree with the things you are saying. They make sense
 23 to me." See id. at 43. See also id. at 40 ("You were saying that you give a presumption of good faith
 24 to the U.S. Attorney and assume, quite logically, that they're not about the business of trying to indict
 25 innocent people or people that they believe to be innocent or the evidence doesn't substantiate the
 26 charges against.").
 27

Judge Burns's discussion of his once having been a prosecutor before the Grand Jury
 28 compounded the error inherent in his praising of the government attorneys. See Ex. A at 9-10.
 29 Judge Burns's instructions implied that as a prior prosecutor and current "jury liaison judge," see id.
 30 at 8, he would not allow the government attorneys to act inappropriately or to present cases for
 31 indictment where no probable cause existed.

In addition, while Judge Burns instructed the Grand Jury that it had the power to question
 24 witnesses, Judge Burns's instructions also told the Grand Jury that it should "be deferential to the
 25 U.S. Attorney if there is an instance where the U.S. Attorney thinks a question ought not to be
 26 asked." See Ex. A at 12. As the dissent in Navarro-Vargas pointed out, "the grand jury's
 27 independence is diluted by [such an] instruction, which encourages deference to prosecutors."
 28 Navarro-Vargas, 408 F.3d at 1215. The judge's admonition that his statement was only "advice,"
 29 see Ex. A at 12, does not cure the error as courts regularly presume grand jurors follow instructions
 30 provided to them by the court. See id. at 1202, n.23 ("We must presume that grand jurors will follow
 31 instructions because, in fact, we are prohibited from examining jurors to verify whether they
 32 understood the instruction as given and then followed it.").

1 id.2 **B. Navarro-Vargas Establishes Limits on the Ability of Judges to Constrain the**
3 **Powers of the Grand Jury, Which Judge Burns Far Exceeded in His**
4 **Instructions as a Whole During Impanelment.**5 The Ninth Circuit has, over vigorous dissents, rejected challenges to various instructions
6 given to grand jurors in the Southern District of California. See Navarro-Vargas II, 408 F.3d 1184.
7 While the Ninth Circuit has thus far (narrowly) rejected such challenges, it has, in the course of
8 adopting a highly formalistic approach⁶ to the problems posed by the instructions, endorsed many
9 of the substantive arguments raised by the defendants in those cases. The district court's instructions
10 cannot be reconciled with the role of the grand jury as set forth in Navarro-Vargas II. Taken
11 together, the voir dire of and instructions given to the January 2007 Grand Jury, go far beyond those
12 at issue in Navarro-Vargas, taking a giant leap in the direction of a bureaucratic, deferential grand
13 jury, focused solely upon probable cause determinations and utterly unable to exercise any quasi-
14 prosecutorial discretion. That is not the institution the Framers envisioned. See United States v.
15 Williams, 504 U.S. 36, 49 (1992).16 For instance, with respect to the grand jury's relationship with the prosecution, the Navarro-
17 Vargas II majority acknowledges that the two institutions perform similar functions: "the public
18 prosecutor, in deciding whether a particular prosecution shall be instituted or followed up, performs
19 much the same function as a grand jury." Navarro-Vargas II, 408 F.3d at 1200 (quoting Butz v.
20 Economou, 438 U.S. 478, 510 (1978)). Accord United States v. Navarro-Vargas, 367 F.3d 896, 900
21 (9th Cir. 2004) (Navarro-Vargas I)(Kozinski, J., dissenting) (The grand jury's discretion in this
22 regard "is most accurately described as prosecutorial."). See also Navarro-Vargas II, 408 F.3d at
23 1213 (Hawkins, J., dissenting). It recognizes that the prosecutor is not obligated to proceed on any
24 indictment or presentment returned by a grand jury, id., but also that "the grand jury has no
25 obligation to prepare a presentment or to return an indictment drafted by the prosecutor." Id. See
26 Niki Kuckes, The Democratic Prosecutor: Explaining the Constitutional Function of the Federal27 ⁶ See Navarro-Vargas II, 408 F.3d at 1210-11 (Hawkins, J., dissenting) (criticizing the
28 majority because "[t]he instruction's use of the word 'should' is most likely to be understood as
imposing an inflexible 'duty or obligation' on grand jurors, and thus to circumscribe the grand jury's
constitutional independence.").

1 Grand Jury, 94 Geo. L.J. 1265, 1302 (2006) (the grand jury's discretion not to indict was "arguably
 2 . . . the most important attribute of grand jury review from the perspective of those who insisted that
 3 a grand jury clause be included in the Bill of Rights") (quoting Wayne LaFave et al., Criminal
 4 Procedure § 15.2(g) (2d ed. 1999)).

5 Indeed, the Navarro-Vargas II majority agrees that the grand jury possesses all the attributes
 6 set forth in Vasquez v. Hillery, 474 U.S. 254 (1986). See id.

7 The grand jury thus determines not only whether probable cause exists, but also
 8 whether to "charge a greater offense or a lesser offense; numerous counts or a single
 9 count; and perhaps most significant of all, a capital offense or a non-capital offense --
 all on the basis of the same facts. And, significantly, the grand jury may refuse to
 return an indictment even "where a conviction can be obtained."

10 Id. (quoting Vasquez, 474 U.S. at 263). The Supreme Court has itself reaffirmed Vasquez's
 11 description of the grand jury's attributes in Campbell v. Louisiana, 523 U.S. 392 (1998), noting that
 12 the grand jury "controls not only the initial decision to indict, but also significant questions such as
 13 how many counts to charge and whether to charge a greater or lesser offense, including the important
 14 decision whether to charge a capital crime." Id. at 399 (citing Vasquez, 474 U.S. at 263). Judge
 15 Hawkins notes that the Navarro-Vargas II majority accepts the major premise of Vasquez: "the
 16 majority agrees that a grand jury has the power to refuse to indict someone even when the prosecutor
 17 has established probable cause that this individual has committed a crime." See id. at 1214
 18 (Hawkins, J. dissenting). Accord Navarro-Vargas I, 367 F.3d at 899 (Kozinski, J., dissenting);
 19 United States v. Marcucci, 299 F.3d 1156, 1166-73 (9th Cir. 2002) (per curiam) (Hawkins, J.,
 20 dissenting). In short, the grand jurors' prerogative not to indict enjoys strong support in the Ninth
 21 Circuit. But not in Judge Burns's instructions.

22 **C. Judge Burns's Instructions Forbid the Exercise of Grand Jury Discretion
 23 Established in Both Vasquez and Navarro-Vargas II.**

24 The Navarro-Vargas II majority found that the instruction in that case "leave[s] room for the
 25 grand jury to dismiss even if it finds probable cause," 408 F.3d at 1205, adopting the analysis in its
 26 previous decision in Marcucci. Marcucci reasoned that the instructions do not mandate that grand
 27 jurors indict upon every finding of probable cause because the term "should" may mean "what is
 28 probable or expected." 299 F.3d at 1164 (citation omitted). That reading of the term "should" makes

1 no sense in context, as Judge Hawkins ably pointed out. See Navarro-Vargas II, 408 F.3d at 1210-11
 2 (Hawkins, J., dissenting) ("The instruction's use of the word 'should' is most likely to be understood
 3 as imposing an inflexible 'duty or obligation' on grand jurors, and thus to circumscribe the grand
 4 jury's constitutional independence."). See also id. ("The 'word' should is used to express a duty [or]
 5 obligation.") (quoting The Oxford American Diction and Language Guide 1579 (1999) (brackets in
 6 original)).

7 The debate about what the word "should" means is irrelevant here; the instructions here make
 8 no such fine distinction. The grand jury instructions make it painfully clear that grand jurors simply
 9 may not choose not to indict in the event of what appears to them to be an unfair application of the
 10 law: should "you disagree with that judgment made by Congress, then your option is not to say 'well,
 11 I'm going to vote against indicting even though I think that the evidence is sufficient'...." See Ex. A
 12 at 8-9. Thus, the instruction flatly bars the grand jury from declining to indict because they disagree
 13 with a proposed prosecution. No grand juror would read this language as instructing, or even
 14 allowing, him or her to assess "the need to indict." Vasquez, 474 U.S. at 264.

15 While Judge Burns used the word "should" instead of "shall" during voir dire with respect
 16 to whether an indictment was required if probable cause existed, see Ex. B at 4, 8, n context, it is
 17 clear that he could only mean "should" in the obligatory sense. For example, when addressing a
 18 prospective juror, Judge Burns not only told the jurors that they "should" indict if there is probable
 19 cause, he told them that if there is not probable cause, "then the grand jury should hesitate and not
 20 indict." See id. at 8. At least in context, it would strain credulity to suggest that Judge Burns was
 21 using "should" for the purpose of "leaving room for the grand jury to [indict] even if it finds [no]
 22 probable cause." See Navarro-Vargas, 408 F.3d at 1205. Clearly he was not.

23 The full passage cited above effectively eliminates any possibility that Judge Burns intended
 24 the Navarro-Vargas spin on the word "should."

25 [T]he grand jury is determining really two factors: "do we have a reasonable belief
 26 that a crime was committed? And second, do we have a reasonable belief that the
 person that they propose that we indict committed the crime?"

27 If the answer is "yes" to both of those, then the case should move forward. If the
 28 answer to either of the questions is "no," then the grand jury should not hesitate and
 not indict.

1 See Ex. B at 8. Of the two sentences containing the word "should," the latter of the two essentially
 2 states that if there is no probable cause, you *should* not indict. Judge Burns could not possibly have
 3 intended to "leav[e] room for the grand jury to [indict] even if it finds [no] probable cause." See
 4 Navarro-Vargas, 408 F.3d at 1205 (citing Marcucci, 299 F.3d at 1159). That would contravene the
 5 grand jury's historic role of protecting the innocent. See, e.g., United States v. Calandra, 414 U.S.
 6 338, 343 (1974) (The grand jury's "responsibilities continue to include both the determination
 7 whether there is probable cause and the protection of citizens against unfounded criminal
 8 prosecutions.") (citation omitted).

9 By the same token, if Judge Burns said that "the case should move forward" if there is
 10 probable cause, but intended to "leav[e] room for the grand jury to dismiss even if it finds probable
 11 cause," see Navarro-Vargas, 408 F.3d at 1205 (citing Marcucci, 299 F.3d at 1159), then he would
 12 have to have intended two different meanings of the word "should" in the space of two consecutive
 13 sentences. That could not have been his intent. But even if it were, no grand jury could ever have
 14 had that understanding.⁷ Jurors are not presumed to be capable of sorting through internally
 15 contradictory instructions. See generally United States v. Lewis, 67 F.3d 225, 234 (9th Cir. 1995)
 16 ("where two instructions conflict, a reviewing court cannot presume that the jury followed the correct
 17 one") (citation, internal quotations and brackets omitted).

18 Lest there be any room for ambiguity, on no less than four occasions, Judge Burns made it
 19 explicitly clear to the grand jurors that "should" was not merely suggestive, but obligatory:

20 (1) The first occasion occurred in the following exchange when Judge Burns conducted
 21 voir dire and excused a potential juror (CSW):

22 The Court: . . . If there's probable cause, then the case should go forward. I wouldn't
 23 want you to say, "Well, yeah, there's probable cause. But I still don't like what the
 24 government is doing. I disagree with these laws, so I'm not going to vote for it to go
 25 forward." If that's your frame of mind, then probably you shouldn't serve. Only you
 26 can tell me that.

27 Prospective Juror: Well, I think I may fall in that category.
 28 The Court: In the latter category?

27 This argument does not turn on The defendant's view that the Navarro-Vargas/Marcucci
 28 reading of the word "should" in the model instructions is wildly implausible. Rather, it turns on the
 context in which the word is employed by Judge Burns in his unique instructions, context which
 eliminates the Navarro-Vargas/Marcucci reading as a possibility.

1 Prospective Juror: Yes.

2 The Court: Where it would be difficult for you to support a charge even if you
thought the evidence warranted it?

3 Prospective Juror: Yes.

4 The Court: I'm going to excuse you then.

5 See Ex. B at 17. There was nothing ambiguous about the word "should" in this exchange with a
6 prospective juror. Even if the prospective juror did not like what the government was doing in a
7 particular case, that case "should go forward" and Judge Burns expressly disapproved of any vote
8 that might prevent that. See id. ("I wouldn't want you [to vote against such a case]"). The sanction
9 for the possibility of independent judgment was dismissal, a result that provided full deterrence of
10 that juror's discretion and secondary deterrence as to the exercise of discretion by any other
prospective grand juror.

11 (2) In an even more explicit example of what "should" meant, Judge Burns makes clear
12 that it there is an unbending obligation to indict if there is probable cause. Grand jurors have no
13 other prerogative.

14 Court . . . It's not for me to say, "Well, I don't like it. So I'm not going to follow it here."

15 You'd have a similar *obligation* as a grand juror even though you might have to grit
16 your teeth on some cases. Philosophically, if you were a member of Congress, you'd
vote against, for example, criminalizing marijuana. I don't know if that's it, but you'd
vote against criminalizing some drugs.

17 That's not what your *prerogative* is here. Your prerogative instead is act like a judge
18 and to say, "All right. This is what I've got to deal with objectively. Does it seem to
19 me that a crime was committed? Yes. Does it seem to me that this person's
involved? It does." *And then your obligation, if you find those things to be true,*
would be to vote in favor of the case going forward.

21 Id. at 26-27 (emphasis added). After telling this potential juror (REA) what his obligations and
22 prerogatives were, the Court inquired as to whether "you'd be inclined to let people go on drug cases
23 even though you were convinced there was probable cause they committed a drug offense?" Id. at
24 27. The potential juror responded: "It would depend on the case." Id. Nevertheless, that juror was
25 excused. Id. at 28. Again, in this context, and contrary to the situation in Navarro-Vargas, "should"
26 means "shall"; it is obligatory, and the juror has no prerogative to do anything other than indict if
27 there is probable cause.

28 Moreover, as this example demonstrates, the issue is not limited to whether the grand jury

1 believes a particular law to be "unwise." This juror said that any decision to indict would not depend
 2 on the law, but rather it would "depend on the case." Thus, it is clear that Judge Burns's point was
 3 that if a juror could not indict on probable cause for *every* case, then that juror was not fit for service.
 4 It is equally clear that the prospective juror did not dispute the "wisdom of the law;" he was prepared
 5 to indict under some factual scenarios, perhaps many. But Judge Burns did not pursue the question
 6 of what factual scenarios troubled the prospective jurors, because his message is that there is no
 7 discretion not to indict.

8 (3) As if the preceding examples were not enough, Judge Burns continued to pound the
 9 point home that "should" meant "shall" when he told another grand juror during voir dire: "[W]hat
 10 I have to insist on is that you follow the law that's given to us by the United States Congress. We
 11 enforce the federal laws here." See id. at 61.

12 (4) And then again, after swearing in all the grand jurors who had already agreed to indict
 13 in every case where there was probable cause, Judge Burns reiterated that "should" means "shall"
 14 when he reminded them that "your option is not to say 'well, I'm going to vote against indicting even
 15 though I think that the evidence is sufficient . . . Instead your *obligation* is . . . not to bring your
 16 personal definition of what the law ought to be and try to impose that through applying it in a grand
 17 jury setting." See Ex. A at 9.

18 Moreover, Judge Burns advised the grand jurors that they were forbidden from considering
 19 the penalties to which indicted persons may be subject.

20 Prospective Juror (REA): ... And as far as being fair, it kind of depends on what the
 21 case is about because there is a disparity between state and federal law.

22 The Court: In what regard?

23 Prospective Juror: Specifically, medical marijuana.

24 The Court: Well, those things -- the consequences of your determination shouldn't
 25 concern you in the sense that penalties or punishment, things like that -- *we tell trial*
 26 *jurors, of course, that they cannot consider the punishment or the consequence that*
Congress has set for these things. We'd ask you to also abide by that. We want you
 27 to make a business-like decision of whether there was a probable cause. ...

28 See Ex. B at 24-25 (emphasis added). A "business-like decision of whether there was a probable
 29 cause" would obviously leave no role for the consideration of penalty information.

30 The Ninth Circuit previously rejected a claim based upon the proscription against
 31 consideration of penalty information based upon the same unlikely reading of the word "should"

1 employed in Marcucci. See United States v. Cortez-Rivera, 454 F.3d 1038, 1040-41 (9th Cir. 2006).
 2 Cortez-Rivera is inapposite for two reasons. First, Judge Burns did not use the term "should" in the
 3 passage quoted above. Second, that context, as well as his consistent use of a mandatory meaning
 4 in employing the term, eliminate the ambiguity (if there ever was any) relied upon by Cortez-Rivera.
 5 The instructions again violate Vasquez, which plainly authorized consideration of penalty
 6 information. See 474 U.S. at 263.

7 Noting can mask the undeniable fact that Judge Burns explicitly instructed the jurors time
 8 and time again that they had a duty, an obligation, and a singular prerogative to indict each and every
 9 case where there was probable cause. These instructions go far beyond the holding of Navarro-
 10 Vargas and stand in direct contradiction of the Supreme Court's decision in Vasquez. Indeed, it
 11 defies credulity to suggest that a grand juror hearing these instructions, and that voir dire, could
 12 possibly believe what the Supreme Court held in Vasquez:

13 The grand jury does not determine only that probable cause exists to believe that a
 14 defendant committed a crime, or that it does not. In the hands of the grand jury lies
 15 the power to charge a greater offense or a lesser offense; numerous counts or a single
 16 count; and perhaps most significant of all, a capital offense or a non-capital offense –
 17 all on the basis of the same facts. Moreover, “[t]he grand jury is not bound to indict
 18 in every case where a conviction can be obtained.”

19 474 U.S. at 263 (quoting United States v. Ciambrone, 601 F.2d 616, 629 (2nd Cir. 1979) (Friendly,
 20 J., dissenting)); accord Campbell v. Louisiana, 523 U.S. 392, 399 (1998) (The grand jury “controls
 21 not only the initial decision to indict, but also significant decisions such as how many counts to
 22 charge and whether to charge a greater or lesser offense, including the important decision whether
 23 to charge a capital crime.”). Nor would the January 2007 grand jury ever believe that it was
 24 empowered to assess the “the need to indict.” See id. at 264. Judge Burns's grand jury is not
 25 Vasquez's grand jury. The instructions therefore represent structural constitutional error “that
 26 interferes with the grand jury's independence and the integrity of the grand jury proceeding.” See
 27 United States v. Isgro, 974 F.2d 1091, 1094 (9th Cir. 1992). The indictment must therefore be
 28 dismissed. Id.

29 The Navarro-Vargas II majority's faith in the structure of the grand jury is not a cure for the
 30 instructions excesses. The Navarro-Vargas II majority attributes “[t]he grand jury's discretion -- its
 31 independence -- [to] the absolute secrecy of its deliberations and vote and the unreviewability of its

1 decisions." 408 F.3d at 1200. As a result, the majority discounts the effect that a judge's instructions
 2 may have on a grand jury because "it is the *structure* of the grand jury process and its *function* that
 3 make it independent." Id. at 1202 (emphases in the original).

4 Judge Hawkins sharply criticized this approach. The majority, he explains, "believes that the
 5 'structure' and 'function' of the grand jury -- particularly the secrecy of the proceedings and
 6 unreviewability of many of its decisions -- sufficiently protects that power." See id. at 1214
 7 (Hawkins, J., dissenting). The flaw in the majority's analysis is that "[i]nstructing a grand jury that
 8 it lacks power to do anything beyond making a probable cause determination ... unconstitutionally
 9 undermines the very structural protections that the majority believes save[] the instruction." Id.
 10 After all, it is an "'almost invariable assumption of the law that jurors follow their instructions.'" Id.
 11 (quoting Richardson v. Marsh, 481 U.S. 200, 206 (1987)). If that "invariable assumption" were to
 12 hold true, then the grand jurors could not possibly fulfill the role described in Vasquez. Indeed,
 13 "there is something supremely cynical about saying that it is fine to give jurors erroneous instructions
 14 because nothing will happen if they disobey them." Id.

15 In setting forth Judge Hawkins' views, Mr. Santana understands that this Court may not adopt
 16 them solely because the reasoning that supports them is so much more persuasive than the majority's
 17 sophistry. Rather, he sets them forth to urge the Court *not to extend* what is already untenable
 18 reasoning.

19 Here, again, the question is not an obscure interpretation of the word "should", especially in
 20 light of the instructions and commentary by Judge Burns during voir dire discussed above -
 21 unaccounted for by the Court in Navarro-Vargas II because they had not yet been disclosed to the
 22 defense, but an absolute ban on the right to refuse to indict that directly conflicts with the recognition
 23 of that right in Vasquez, Campbell, and both Navarro-Vargas II opinions. Navarro-Vargas II is
 24 distinguishable on that basis, but not only that.

25 Judge Burns did not limit himself to denying the grand jurors the power that Vasquez plainly
 26 states they enjoy. He also excused prospective grand jurors who might have exercised that Fifth
 27 Amendment prerogative, excusing "three [jurors] in this case, because they could not adhere to [that]
 28 principle...." See Ex. A at 8; Ex. B at 17, 28. The structure of the grand jury and the secrecy of its

1 deliberations cannot embolden grand jurors who are no longer there, likely because they expressed
 2 their willingness to act as the conscience of the community. See Navarro-Vargas II, 408 F.3d at
 3 1210-11 (Hawkins, J., dissenting) (a grand jury exercising its powers under Vasquez "serves ... to
 4 protect the accused from the other branches of government by acting as the 'conscience of the
 5 community.'") (quoting Gaither v. United States, 413 F.2d 1061, 1066 & n.6 (D.C. Cir. 1969)). The
 6 federal courts possess only "very limited" power "to fashion, on their own initiative, rules of grand
 7 jury procedure," United States v. Williams, 504 U.S. 36, 50 (1992), and, here, Judge Burns has both
 8 fashioned his own rules and enforced them.

9 **D. The Instructions Conflict with Williams' Holding That There Is No Duty to**
Present Exculpatory Evidence to the Grand Jury.

10
 11 In Williams, the defendant, although conceding that it was not required by the Fifth
 12 Amendment, argued that the federal courts should exercise their supervisory power to order
 13 prosecutors to disclose exculpatory evidence to grand jurors, or, perhaps, to find such disclosure
 14 required by Fifth Amendment common law. See 504 U.S. at 45, 51. Williams held that "as a
 15 general matter at least, no such 'supervisory' judicial authority exists." See id. at 47. Indeed,
 16 although the supervisory power may provide the authority "to dismiss an indictment because of
 17 misconduct before the grand jury, at least where that misconduct amounts to a violation of one of
 18 those 'few, clear rules which were carefully drafted and approved by this Court and by Congress to
 19 ensure the integrity of the grand jury's functions,'" id. at 46 (citation omitted), it does not serve as "a
 20 means of *prescribing* such standards of prosecutorial conduct in the first instance." Id. at 47
 21 (emphasis added). The federal courts possess only "very limited" power "to fashion, on their own
 22 initiative, rules of grand jury procedure." Id. at 50. As a consequence, Williams rejected the
 23 defendant's claim, both as an exercise of supervisory power and as Fifth Amendment common law.
 24 See id. at 51-55.

25 Despite the holding in Williams, the instructions here assure the grand jurors that prosecutors
 26 would present to them evidence that tended to undercut probable cause. See Ex. A at 20.

27 Now, again, this emphasizes the difference between the function of the grand jury
 28 and the trial jury. You're all about probable cause. If you think that there's evidence
 out there that might cause you say "well, I don't think probable cause exists," then it's
 incumbent upon you to hear that evidence as well. As I told you, in most instances,

1 *the U.S. Attorneys are duty-bound to present evidence that cuts against what they*
 2 *may be asking you to do if they're aware of that evidence.*

3 Id. (emphasis added). Moreover, the district court later returned to the notion of the prosecutors and
 4 their duties, advising the grand jurors that they "can expect that the U.S. Attorneys that will appear
 5 in from of [them] will be candid, they'll be honest, and ... they'll act in good faith in all matters
 6 presented to you." See id. at 27. The Ninth Circuit has already concluded it is likely this final
 7 comment is "unnecessary." See Navarro-Vargas, 408 F.3d at 1207.

8 This particular instruction has a devastating effect on the grand jury's protective powers,
 9 particularly if it is not true. It begins by emphasizing the message that Navarro-Vargas II somehow
 10 concluded was not conveyed by the previous instruction: "You're all about probable cause." See Ex.
 11 A at 20. Thus, once again, the grand jury is reminded that they are limited to probable cause
 12 determinations (a reminder that was probably unnecessary in light of the fact that Judge Burns had
 13 already told the grand jurors that they likely would be excused if they rejected this limitation). The
 14 instruction goes on to tell the grand jurors that they should consider evidence that undercuts probable
 15 cause, but also advises the grand jurors that the prosecutor will present it. The end result, then, is
 16 that grand jurors should consider evidence that goes against probable cause, but, if none is presented
 17 by the government, they can presume that there is none. After all, "in most instances, the U.S.
 18 Attorneys are duty-bound to present evidence that cuts against what they may be asking you to do
 19 if they're aware of that evidence." See id. Moreover, during voir dire, Judge Burns informed the
 20 jurors that "my experience is that the prosecutors don't play hide-the-ball. If there's something
 21 adverse or that cuts against the charge, you'll be informed of that. *They have a duty to do that.*" See
 22 Ex. B at 14-15 (emphasis added). Thus, if the exculpatory evidence existed, it necessarily would
 23 have been presented by the "duty-bound" prosecutor, because the grand jurors "can expect that the
 24 U.S. Attorneys that will appear in from of [them] will be candid, they'll be honest, and ... they'll act
 25 in good faith in all matters presented to you." See Ex. A at 27.

26 These instructions create a presumption that, in cases where the prosecutor does not present
 27 exculpatory evidence, no exculpatory evidence exists. A grand juror's reasoning, in a case in which
 28 no exculpatory evidence was presented, would proceed along these lines:

- (1) I have to consider evidence that undercuts probable cause.
- (2) The candid, honest, duty-bound prosecutor would, in good faith, have presented any such evidence to me, if it existed.
- (3) Because no such evidence was presented to me, I may conclude that there is none.

If some exculpatory evidence were presented, a grand juror would necessarily presume that the evidence presented represents the universe of all available exculpatory evidence; if there was more, the jury-bound prosecutor would have presented it.

The instructions, therefore, discourage investigation -- if exculpatory evidence were out there, the prosecutor would present it, so investigation is a waste of time -- and provide additional support for a probable cause determination: i.e., this case may be weak, but I know that there is nothing on the other side of the equation because it was not presented. A grand jury so badly misguided is a bad jury at all under the Fifth Amendment.

VI.

MOTION TO DISMISS THE INDICTMENT
DUE TO UNDUE DELAY IN FILING THE CHARGES

A. 18 U.S.C. 7602(2) Charges: Tax Years 2001 and 2002

Reasons for dismissal of 18 U.S.C. § 7602(2) (aiding and assisting the preparation of false tax returns for tax years 2001 and 2002):

1. Undue Delay: Fifth Amendment Due Process Violation

These charges are old. It was known to the IRS CID since March 2002, about six years ago, CID received a detailed information from a competitor tax preparer.⁸ The administrative gation was officially opened in January 2003, over five years ago. Then, sometime in early ber 2003, my two offices were searched by a group of CID, wearing jackets with special back tags (IRS special agents). The computers, including crashed computers, and records onfiscated.

Sometime in May 2005, my two lawyers and I had a conference with the IRS lawyers and his

⁸ The information above is taken from the Probable Cause Affidavit to support the search warrant, signed by Special Agent Len Bradley.

1 teammates. I was advised by my two attorneys not to make any statements. We were informed that
2 the administrative investigation was completed, specific method, and non-complex. And, the
3 additional tax liabilities. I was recommended for prosecution in May 2005. The indictment and trial
4 should have happened then in 2005. The government has no acceptable reason to drag this on for
5 another almost three additional years. This is really a violation of due process of law and my Fifth
6 Amendment and Sixth Amendment rights.

7 **2. Prejudice to the Defendant**

8 The government's undue delay made the government gain a tactical advantage against the
9 defendant. The government's undue delay caused many nights and days and years of anxieties to
10 defendant and families.

11 The defendant's star witness, Dominga Harlow, recently died of lung cancer and suffered
12 anxieties before death, because she was aware that she worked for me for approximately five years,
13 1999-2003. She can no longer testify at trial. See Exhibit C, Death Certificate. Her responsibilities
14 were: answering telephones and taking oral or written statements from clients; preparing tax
15 appointment reports; sometimes collecting payments; serving coffee; and other office errands. There
16 was no agreement about salary, just gifts such as: casino dinners, and cash for the machines, and
17 other small gifts. She was retired on disability because she had a kidney transplant, so helping me
18 during the tax season was to ease her boredom. She was identified as Dominga Zapanga by the CID.
19 I don't know how CID got a wrong last name. Her name was Dominga Harlow, a friend of mine for
20 over 35 years.

21 Defendant lost records and some memories due to span of time. Records that were secured
22 were diminished because families who closed the office inefficient and irresponsible. The business
23 office was closed last May 30, 2008. Defendant has been incarcerated from March 28 through the
24 present date.

25 There was no federal interest gained by prosecution. Prosecution, litigation and trial,
26 incarceration of the defendant, attorney fees, juror cost and the Honorable Judge's cost, appellate
27 cost are all wasting budgeted money of the government and wasting time. These costs and time can
28 and should be spent on the most culpable cases.

1 **3. Prejudice to the Public**

2 The government did not file a restraining order or file a civil injunction while charges were
 3 pending years back. Therefore, the government did not protect the public promptly and effectively.

4 **B. 18 U.S.C. 7602(1) Charges: Tax Years 2001 and 2002**

5 Reasons for dismissal:

6 The government's undue delay in charging the 2001 and 2002 tax years was to gain a tactical
 7 advantage. These allegations were known to the government six years ago. Therefore, there was
 8 no acceptable reason for the undue delay. Finally, the government violated the defendant's due
 9 process rights.

10 The defendant was prejudiced by the delay. It caused severe anxiety to the defendant and
 11 families. Records of memories were lost. Not all of it, but most of it. Again, the government gained
 12 a tactical advantage. The additional amount (deficit) due to underestimated income was \$3500 in
 13 2001 and approximately \$35,000 in 2002. The approximate total was \$38,500. These figures were
 14 given to me by the IRS lawyer during the May 2005 conference. These amounts are much lower
 15 than prosecution and trial. These amounts could be used to settle the civil case effectively, without
 16 ruining defendant's capability to produce income.

17 **VII.**

18 **MOTION TO DISMISS THE INDICTMENT DUE TO SELECTIVE PROSECUTION**

19 The government violated the Fourteenth Amendment of the United States Constitution –
 20 Equal Protection of Law. Other tax preparers who had similar or the same charges (§7206(2)) were
 21 only barred from preparing tax returns and the DOJ just filed a civil injunction/case. See Exhibit D.
 22 I don't understand why the DOJ has to criminally prosecute me. Just recently in federal court in the
 23 Southern District of California, dated February 2008, Roosevelt Kyle was barred from preparing tax
 24 returns by the Honorable Barry Ted Moskowitz. See Exhibit E.

25 **VIII.**

26 **MOTION TO DISMISS THE INDICTMENT DUE TO THE GOVERNMENT**
 27 **MISLEADING THE GRAND JURY ABOUT THE FACTS OF THE CASE**

28 The grand jury indictment was totally misleading to the grand jury. The prosecutor
 apparently did not tell the grand jury that the official investigation was opened in January 2003 and

1 known to the government in March 2002. And, also, the prosecutor did not tell the grand jury that
 2 the defendant continued preparing tax returns until March 28, 2008 and that the government did not
 3 take any civil action to protect the public back then. The government also did not tell the grand jury
 4 that the amount of additional suspected underestimated income is very little, compared to the
 5 government expenses on the prosecution; arrest; trial and incarceration; lawyers' fees; and especially
 6 the Honorable Judge's time.

7 **IX.**

8 **MOTION TO DISMISS FOR PROSECUTORIAL MISCONDUCT**

9 The government used a magnitude of manipulation as the prosecutors used lies and
 10 exaggeration to intimidate the Honorable Magistrate Judge Anthony J. Battaglia so that bail bond
 11 became too excessive when these kind of charges only call for a summons and release on my own
 12 recognition. The most damaging part of government's lies and exaggeration is that they scared my
 13 family members and they tried not to be qualified on the bond application.

14 **X.**

15 **THE GOVERNMENT SHOULD BE REQUIRED TO DISCLOSE THE INFORMANT'S**
IDENTITY AND ANY *BRADY/GIGLIO* MATERIAL

16 The defendant requests that this Court order the government to reveal the identity of the tax
 17 preparer informant referenced in Special Agent Bradley's search warrant affidavit. The informant
 18 is a material, percipient witness. His identity and all Brady/Giglio material must be disclosed. In
 19 United States v. Roviaro, 353 U.S. 53 (1957), the Supreme Court explained that the government's
 20 privilege of withholding an informer's identity exists to further and protect the public interest in law
 21 enforcement, but that privilege is not absolute. Id. at 61-62. It must give way to disclosure when
 22 the "fundamental requirements of fairness" require. Id. Specifically, "where the disclosure...is
 23 relevant and helpful to the defense of an accused or is essential to a fair determination of a cause."
 24 Id. at 61-62. Since Roviaro, the Ninth Circuit has specified certain facts to be considered, i.e. the
 25 level of involvement of the informer, the helpfulness of the informer to the defense, United States
 26 v. Ayala, 643 F.2d 244, 246-47 (5th Cir. 1981), and where "a close relationship between the asserted
 27 defense and the informer's likely testimony favors disclosure." Id. at 247.

28 ///

1 The Ninth Circuit has affirmed Roviano's principles in United States v. Ramirez-Rangel, 103
 2 F.3d 1051, 1505 (9th Cir. 1997) (defendants have the right to learn the identity of the government's
 3 confidential informants if they show that the information is "relevant and helpful to the defense of
 4 an accused or is essential to a fair determination of the cause."). The facts of this case requires
 5 production of the informant. Thus, the government must disclose the informant's identity and
 6 location, as well as disclose the existence of any other percipient witness unknown or unknowable
 7 to the defense. Roviano, 353 U.S. at 61-2. The government must disclose any information derived
 8 from informants which exculpates or tends to exculpate the defendant. The defendant also requests
 9 disclosure of any information indicating bias on the part of any informant or cooperating witness.
 10 See Giglio v. United States, 405 U.S. 150 (1972). The defendant has been in jail since March 28 to
 11 present, so the Court is not endangering the informant by ordering the government to reveal his/her
 12 identity.

13 **XI**14 **MOTION TO PRODUCE WITNESS AND EXHIBIT LISTS**

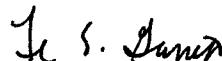
15 Pursuant to United States v. W.R. Grace, 526 F.3d 499 (9th Cir. 2008) (en banc), the
 16 defendant requests that the government produce exhibit and witness lists as soon as possible to assist
 17 her in preparing for trial.

18 **XII.**19 **CONCLUSION**

20 For the reasons stated, I request that this Court grant my motions.

22 Respectfully submitted,

23 DATED: August 10, 2008


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6

7

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
(HONORABLE M. JAMES LORENZ)

17 Counsel for Defendant certifies that the foregoing pleading is true and accurate to the best of her
18 information and belief, and that a copy of the foregoing document has been served this day upon:

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Respectfully submitted,

27 | DATED: August 11, 2008

/s/ Erica K. Zunkel
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